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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 546

CLAYTON M. JONES and AIMEE JONES, His Wife, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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Now come Clayton M. Jones and Aimee Jones, his wife, petitioners in the above entitled matter and petition this Honorable Court pursuant to Rule 33, for a rehearing on their petition for a writ of certiorari filed herein on January 21, 1954, on the basis of substantial grounds available to petitioner although not previously presented, as follows:

1. The complaint in the case under review alleges "negligence" as well as "misrepresentation."

2. Title 28 U. S. Code 1346(b) confers on plaintiffs a vested right to sue the United States under the Federal Tort Claims Act for damages caused them by the negligence of federal employees.

3. Even though plaintiffs are barred from recovery on grounds of misrepresentation by 28 U. S. Code 2680(h), they are not barred from proceeding on the theory of negligence, if they would have a cause of action under the law of the place where the negligent act occurred (28 U. S. Code 1346(b) and 2674).

4. The impact of respondent's negligence occurred in the State of New York, making that the applicable substantive law. *Young* v. *Masci,* 289 U. S. 253, 77 L. ed. 1158.

5. The law of the State of New York gives plaintiffs a substantive right of action for "carelessness in making statements", "negligent statement" or "negligence in the spoken word". As stated in *Nichols* v. *Clark, McMullen and Riley,* 261 N.Y. 118, 125, 184 N. E. 729, the rule in New York is:

> "The cause of action, if any, is rather based upon the recent doctrine of negligence in the spoken word and liability for carelessness in making statements upon which others were expected to rely and upon which they did act to their damage. A negligent statement may be the basis for recovery of damage. International Products Co. v. Erie R.R. Co., 244 N.Y. 331, 155 N.E. 662, 56 A.L.R. 1366; Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275, 23 A.L.R. 1425; Ultramares Corp. v. Touche, 255 N.Y. 170, 174, N.E. 441, 74 A.L.R. 1139. See also, 42 Harvard Law Review (1929) p. 733; 24 Harvard Law Review, 415; 14 Harvard Law Review, 184; 36 Yale Law Journal, 1028; Doyle v. Chatham & Phoenix Nat. Bank, 253 N.Y. 369."

This case defines a right of action for negligence which is neither coextensive with nor limited to misrepresentation. The distinction is the difference between a careless representation and a misrepresentation. The plaintiffs herein were entitled to have their claim tested against the Federal Tort Claims Act in the light of the local law contained in the *Nichols* case. Unless this Court grants certiorari, plaintiffs and similarly situated persons are forever deprived of the rights conferred on them by Congress in said Act.

6. The judgment of the United States Court of Appeals petitioned from herein errs in that it bars plaintiffs from their statutory right to sue for negligence under the rule in *Nichols* v. *Clark, supra,* as distinguished from a cause of action for misrepresentation which has been held to be barred by 28 U. S. Code 2680(h). If said judgment is permitted to stand, plaintiffs are debarred from any adequate remedy at law or in equity.

Wherefore, the premises considered, plaintiffs pray that upon rehearing their petition for a writ of certiorari herein be granted in order that a substantial question of far reaching import may be properly reviewed.

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Certificate of Counsel

Roy St. Lewis and Carl L. Shipley, counsel for petitioners herein, certify that they have read the above written petition for rehearing of order denying certiorari, and know the contents thereof, and that said petition is presented in good faith and not for delay, and said counsel further certify that the above mentioned petition is restricted to grounds specified in Rule 33 of the Rules of this Court.

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